No.

In the Court of Appeal of the State of California
Third Appellate District

Agua Caliente Band of Cahuilla Indians,

Petitioner and Defendant,

vs.

Sacramento County Superior Court,

Respondent.

Fair Political Practices Commission,

Real Party in Interest and Plaintiff.

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT

From an Order of the
Sacramento County Superior Court, No. 02AS04545,
The Honorable Loren E. McMaster

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I

PRELIMINARY STATEMENT

Petitioner, the Agua Caliente Band of Cahuilla Indians (the "Tribe"), seeks review of respondent court's order denying the Tribe's motion to quash service of summons for lack of personal jurisdiction. Plaintiff and real party in interest, the California Fair Political Practices Commission ("FPPC"), filed this action alleging violations of California's Political Reform Act ("PRA"). The Tribe filed a motion to quash predicated on its immunity from suit due to its sovereign status. Despite acknowledging long-standing precedents from the United States Supreme Court and this Court upholding this lawsuit immunity, respondent court nevertheless denied the Tribe's motion.

This Petition is brought pursuant to Code of Civil Procedure section 418.10(c) (authorizing review of the denial of a motion to quash via a petition for extraordinary writ).[1] By denying the motion, respondent court has robbed the Tribe of an essential attribute of its sovereignty. The Tribe's claim of sovereign immunity likewise will be lost if this lawsuit proceeds in the court below. The

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[1] The statute requires that the petition be filed within ten days of the service of written notice of the order denying the motion. The time may be extended for another twenty days by order of court. Respondent court granted the Tribe's request for the extension. (App. 1372) As in the court below, the Tribe makes its appearance here specially, and then only in defense of its sovereign immunity. By filing this Petition, the Tribe does not intend to waive that immunity.

Tribe will be subject to the costs, expense, and burdens of litigation from which it should be immune. That injury is immediate, irreparable, and cannot be rectified by a later reversal on appeal. *See Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 391 (2001) (intervening by writ and directing trial court to grant a tribe's motion to quash in furtherance of federally-recognized tribal immunity from suit); *see Bowen v. Doyle*, 880 F. Supp. 99, 134 (W.D.N.Y. 1995)(claim of tribal sovereign immunity is forever lost by subjecting the defendant to the very process from which it asserts it is immune).

The relationship between the United States and the various Tribes within its borders is governed by federal law. This reflects the fact that the Tribes, whose existence predates the United States Constitution, are not corporations, social clubs or loose affiliations of individuals with a common heritage. They instead are separate and independent nations, whose sovereignty is subordinate only to that of the United States, and not the states themselves.

As a result, federally-recognized Tribes, like Petitioner here, enjoy immunity from suit in the same manner as any other sovereign entity. This immunity applies to lawsuits involving tribal activities undertaken inside or outside designated tribal territory.[2]

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[2] In its order, respondent court relied on authorities holding that individual tribal members may be subject to nondiscriminatory state laws. (App. 1346) This assertion is correct but, as noted below, irrelevant to actions against the Tribe itself. (*See infra* at 28-32)

Moreover, the Supreme Court and inferior appellate courts, including this Court, uniformly have held that this broad immunity may be abrogated *only* in two very narrow circumstances: (1) when suit is specifically authorized by Congress; or (2) when the Tribe has expressly and unequivocally waived its sovereign immunity.

Respondent court correctly recognized the governing immunity rule and further acknowledged that neither of the above-two exceptions applied to the FPPC's lawsuit. (App. 1340-45) Consistent with controlling law, that should have ended the inquiry—the court then should have granted the motion to quash.

Yet, the court went further and devised a "state interest" exception to tribal lawsuit immunity not articulated or recognized in any statute, regulation, or decisional authority. Respondent court determined that because the FPPC's lawsuit is intended to enforce regulations controlling the state's political process, and because no case previously has applied tribal immunity to such suits, this lawsuit could proceed. (App. 1345-46) Respondent court's analysis, however, alternately: (1) *misperceives* the breadth of tribal immunity; and (2) *confuses* the state's regulatory authority with the authorization to sue.

With respect to the first point, the decision apparently assumes that tribal immunity exists only when Congress or the courts specifically confer it. In fact, however, tribal immunity is the rule—

requiring no implementing legislation or judicial action. As noted above, it may be abrogated *only* by action of Congress or waiver by the Tribe. In the absence of either, the immunity indisputably still applies. Thus, respondent court's findings that there was no express Congressional authorization for the FPPC's lawsuit and no express and unequivocal waiver by the Tribe of its immunity from suit should have compelled dismissal of this action.

With respect to the second point, respondent court's order suggests a hierarchy of state regulatory interests, which it opined may be balanced against the Tribe's grant of immunity. (App. 1346-51) There is, however, no authority supporting a court-imposed "balancing test" where tribal immunity from a lawsuit is concerned. (*See infra* at 28-32) Not only has no court applied such a balancing test when determining tribal suit immunity, but that such a standard has been expressly rejected. (*Id.*)

There is no dispute about the state's authority to regulate the state's internal political process. Yet, no matter what state regulatory interest is at stake, the authorities are uniform that the state's power to regulate does not confer, or equate with, the state's jurisdiction to sue a Tribe.

Respondent court's invocation of the Tenth Amendment to the United States Constitution to support the recognition of a balancing of interests test to determine tribal suit immunity does not

change this conclusion. Resort to the Tenth Amendment is merely another way of saying that the state has the power to regulate its internal political process. Nothing in the Tenth Amendment, however, addresses state regulatory enforcement by a lawsuit — an area where the Tribe enjoys immunity absent express Congressional authorization or an express and unequivocal tribal waiver. Thus, the FPPC's power to regulate the state's electoral process, no matter what its source, cannot be relied on to override the Tribe's right to immunity from suit.

Respondent court ultimately concluded that if this lawsuit could not go forward, the state's political process would be "subverted" to a "significant extent." (App. 1345-51) This subversion rationale is a "slippery slope" argument that has no support in the published case law. Courts, including the Supreme Court, have repeatedly held that absent express Congressional authorization or an express waiver, tribal immunity prevents judicial enforcement of *all* state laws and regulations. Redress instead must be had through federal legislation or agreement with the Tribe involved. This case is no exception.[3]

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[3] In this case, the information the FPPC seeks already is readily available to it. The Tribe has posted the information regarding campaign contributions it makes and the lobbyists it employs on its website. Additionally, all lobbyists and recipients of campaign contributions are themselves required to file disclosures with the FPPC showing payments received (in the case of a lobbyist) and of contributions (in the case of campaign committees). Application of the suit immunity here accordingly does not equate with the relevant information being "unavailable."

In short, respondent court's ruling contravenes established law regarding the relations between states and Tribes. In the absence of Congressional authorization for this lawsuit or the Tribe's waiver of its immunity, the court below had no jurisdiction to entertain this action. The erroneous ruling below will, if not reversed, strip the Tribe of its sovereign immunity and subject the Tribe to the burdens and expense of litigation in derogation of settled federal law. This Court should not permit that result. Rather, it should intervene and direct respondent court to grant the motion to quash.

II

PETITION AND FACTUAL BACKGROUND

By this verified petition, the Tribe seeks a writ of mandate, prohibition, or other appropriate writ or order, directing respondent court to vacate its ruling of February 27, 2003, denying the Tribe's motion to quash service for lack of personal jurisdiction, and grant a new and different order quashing service. In making this Petition, the Tribe appears specially and only in defense of its sovereign immunity. By filing this Petition, the Tribe does not intend to waive that imunity.

The Tribe alleges:

1. The materials included in the Appendix accompanying this petition are true and correct copies of the original

documents filed in respondent court in connection with the Tribe's motion to quash, as well as a true and correct copy of the transcript of the hearing which is the subject of this Petition.

2. The Tribe is a federally recognized Indian tribe. (App. 3) It is a defendant in the action entitled *Fair Political Practices Commission v. Agua Caliente Band of Cahuilla Indians, et al.*, pending in the Sacramento County Superior Court and bearing case number 02AS04545 (the "Action"). (App. 1)

3. Real party in interest, California Fair Political Practices Commission ("FPPC"), is the plaintiff in the Action.

4. Respondent Superior Court for the County of Sacramento is a court of general jurisdiction and is the judicial tribunal in which the Action is pending.

5. The FPPC's complaint alleges violations of the Political Reform Act (PRA or the Act) Cal. Govt. Code §§ 81000 *et seq.*, relating to alleged failures to comply with disclosure requirements under the PRA. The Action is an attempt by the FPPC to judicially enforce this State's regulatory scheme against the Tribe. (App. 1-20)

6. The Honorable Loren E. McMaster is the judge assigned to hear the Action in respondent court.

7. On November 1, 2002, the Tribe filed a motion to quash service of summons and complaint in the Action. (App. 21) The Tribe's motion was based on its absolute immunity from suit conferred by federal law as the result of the Tribe's status as a sovereign entity. (App. 25-45)

8. After full briefing and oral argument, respondent court denied the motion to quash and ordered the Tribe to respond to the complaint. (App. 1336-51) However, the Tribe's sovereign immunity is absolute inasmuch as there has been no Congressional authorization for this lawsuit and the Tribe has not waived its immunity. (App. 1340-45) In denying the Tribe's motion and permitting the Action to proceed, respondent court acted in excess of its jurisdiction. (App. 1336-51)

9. Respondent court recognized the Tribe's status as a sovereign nation and the Tribe's immunity from suit. (App. 1336-45) The court further found that there was no Congressional authorization for the FPPC's suit and that the Tribe had not waived its immunity. (App. 1336-46) These findings should have mandated dismissal of the Action. (App. 1336-51) As the basis for its contrary ruling, respondent court relied on:

- The absence of express federal legislation precluding states from regulating tribes with

respect to electoral and legislative processes [App. 1346-47];

- The Tenth Amendment and Guarantee Clause of the United States Constitution, reserving to states the power to regulate electoral and legislative processes [App. 1347]; and

- The paramount importance of California's campaign disclosure requirements. [App. 1347-51]

10. The Tribe has no immediate right to appeal the jurisdictional ruling at issue, or any other plain, speedy, or adequate remedy at law.

11. Immediate appellate relief is necessary to prevent the FPPC from proceeding against the Tribe in derogation of the Tribe's sovereign right to immunity from being sued in another sovereign's court without its consent.

12. Unless respondent court's order is vacated and this Court directs entry of an order granting the Tribe's motion to quash, the Tribe will be forced to incur the cost and expense of defending a

lawsuit from which it has sovereign immunity. That error cannot be rectified by a subsequent appeal.

Therefore, the Tribe prays that this Court:

1. Issue a preemptory writ in the first instance directing Respondent Court to vacate its ruling of February 27, 2003, denying the Tribe's motion to quash service for lack of personal jurisdiction and to enter a new and different order granting the motion; or in the alternative.

2. Issue an alternative writ directing Respondent Court to appear and show cause why its ruling denying the Tribe's motion to quash service for lack of personal jurisdiction should not be vacated, followed by a peremptory writ directing that the motion be granted.

DATED: April 7, 2003.

Respectfully submitted,

REED SMITH CROSBY HEAFEY LLP

By _____
James C. Martin
Attorneys for Petitioner and
Defendant Agua Caliente
Band of Cahuilla Indians

III

VERIFICATION

I, Art Bunce, declare:

1. I am an attorney admitted to practice before the courts of this state. I am one of the attorneys for Petitioner and make this verification because I am familiar with the trial court proceedings giving rise to this Petition.

2. I have read the foregoing Petition, and it is true of my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this Verification was executed in Escondido, California on April 3, 2003.

By _____
Art Bunce

IV

ARGUMENT

The trial court perceived the question presented here to be one of "first impression." (App. 1336) But that characterization can only be applied to the factual context in which this case arises. The legal conclusion that the Tribe should be accorded immunity from the FPPC's suit is neither novel nor unprecedented. That conclusion is compelled by the reasoning in cases from the United States Supreme Court, the intermediate federal courts, and courts in this state, including this one. Indeed, the Supreme Court has expressly rebuffed attempts to alter the conditions under which tribal suit immunity must be applied and instead left it to Congress to address whether lawsuits like this one should be authorized.

These existing precedents make it clear that this case does not present an opportunity for judicial activism in pursuit of state regulation. And that remains so no matter how important the state's regulatory scheme, or compelling its avowed regulatory goals. Thus, even if the state's power to regulate campaign contributions is described as "essential" to the fairness of its electoral process, the FPPC cannot sue the Tribe to enforce its regulations without an express and unequivocal waiver of the Tribe's immunity from suit *or* specific Congressional authorization to sue. *Neither is present*. The legal analysis accordingly need not, and should not, extend any further.

A. Federally Recognized Indian Tribes Have Immunity From Any State Lawsuit Unless The Immunity Has Been Waived Or There Is Express Congressional Authorization To Sue

Federally recognized Indian Tribes enjoy a unique status in our system of jurisprudence. That status flows from their independent sovereignty — a sovereign status that precedes that of the individual states. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (tribal sovereignty "substantially pre-dates our Constitution").

The Tribes' independent sovereign status, in turn, makes them subject only to the superior sovereignty of the United States. As one federal district court aptly put it: "[t]he only entities that can determine the extent to which the immunities and protections are afforded to tribes are Congress and the applicable tribes themselves. The state legislatures have no such right." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1141 (N.D. Okla. 2001).

Courts accordingly recognize that only federal law can define or limit the scope of tribal sovereignty. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("The Court has consistently recognized that . . . 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States'"); *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292

F.3d 1091, 1096 (9th Cir. 2002) ("Indian tribes fall under nearly exclusive federal, rather than state, control . . . Moreover, tribal sovereignty and federal plenary power over Indian affairs, taken together, sharply circumscribe the power of the states to impose citizen-like responsibilities on Indian tribes." (citations omitted)).

There also is no dispute that tribal sovereignty includes a generalized immunity from lawsuits: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *see, e.g., Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 172 (1977)("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe"); *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal. 3d 509, 519 (1985)("Indian tribes are immune from suit in an absence of waiver or consent.").

No matter what the context, absent a waiver or Congressional authorization, the suit immunity applies to all claims, including those in which a state or state agency seeks to judicially enforce its regulatory authority against a tribe. *Kiowa Tribe*, 523 U.S. at 755 & 759 (declining to "draw distinctions between governmental and commercial activities of a tribe," or to "confine immunity from suit to transactions on reservations and to government activities" for purposes of evaluating a tribe's immunity from suit); *Oklahoma Tax*

Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991) (recognizing consistent Congressional reiteration of immunity, and barring counterclaim by state agency to enforce tax assessment).

In *Kiowa Tribe*, 523 U.S. 751, for example, the Supreme Court confronted the question of whether a lawsuit could be brought in state court for the recovery on a promissory note executed by the Tribe. The Court, through Justice Kennedy, held that the Tribe was entitled to immunity from the suit on the note, irrespective of whether it had signed the note on or off the reservation or whether the note related to the Tribe's commercial, as opposed to internal governmental, activities.

In reaching this result, the Court recognized that: "[t]ribal immunity is matter of federal law and not subject to diminution by the States. [Citations.]" *Id.* at 756. It also drew a bright line distinction between the state's ability to regulate off-reservation conduct (which it conceded could exist), and the Tribe's immunity from suit over such conduct:

> We have recognized that a State may have the authority to tax or regulate tribal activities occurring within the State but outside Indian country. [Citations.] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we affirmed that while Oklahoma may tax cigarette sales by a Tribe's store to non-members, the Tribe enjoys immunity from a

> suit to collect unpaid state taxes. [Citations.] There is a difference between the right to demand compliance with state laws and the means available to enforce them. [Citations.] *Kiowa Tribe*, 523 U.S. at 755.

As this quotation suggests, *Kiowa Tribe* was not the first time the Supreme Court had drawn the distinction between a state's perceived right to regulate and a Tribe's immunity from suit.

Some seven years before, in 1991, the Court opined that the right to regulate and the ability to sue were not coextensive in the context of Oklahoma's efforts to collect a sales tax. In that regard, the Court previously had held that a state had the right to require individual tribal members to endure the "minimal burden" of collecting and remitting state sales tax on their sales of cigarettes to non-Indians on a reservation. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976). When the Potawatomi Tribe subsequently refused to comply with this "minimal burden," it sued the Oklahoma Tax Commission to enjoin an assessment, and the state agency counterclaimed against that Tribe for the amount of the assessment.

While reaffirming the Tribe's underlying liability for the state tax, the Court nevertheless held that the Tribe's sovereign immunity barred the state's attempt to enforce the liability through a lawsuit:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complaints that, in effect, decisions such as *Moe* and *Colville*

> give them a right without any remedy. There is no doubt that sovereign immunity bars the State from the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. *Oklahoma Tax Commission*, 498 U.S. at 514.

The specifically articulated distinction between the state's sovereign power to regulate on the one hand, and tribal sovereign immunity from judicial enforcement of such power on the other, has not been lost on intermediate federal courts. Relying on the suit immunity, the Ninth Circuit barred a Title VII lawsuit against the Navajo Nation concerning preferential hiring policies imposed on a third party power district doing business on reservation lands. *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1159-61 (9th Cir. 2002).

While it understood the policies behind the federal statute, those policies played no role in the *Dawavendena* Court's determination of whether the Tribe enjoyed immunity from the lawsuit. Even though a substantive violation of Title VII was present, the issue of whether the Tribe could be sued instead turned solely on the questions of waiver or express Congressional authorization:

> Having determined that the Nation is thrice over a necessary party to the instant litigation, we next consider whether it can feasibly be joined as a party. We hold it cannot. Federally recognized Indian tribes enjoy sovereign immunity from suit, *Pit River Home*, 30 F.3d at 1100, and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. [Citation.]

> In this case, the Nation has not waived its tribal sovereign immunity and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases. *Id.* at 1159.

For the same reason, the Ninth Circuit barred California from suing to enforce the state's fish and game laws on a reservation in *People of the State of California v. The Quechan Tribe of Indians*, 595 F. 2d 1153, 1155-56 (9th Cir. 1979). Again, the court fully understood the state's regulatory interest, but that played no role in the resolution of the immunity issue:

> While the several distinguishing features of this case may make it unique, considered either individually or together, they cannot justify a refusal, by this court, to recognize the Tribe's claim of sovereign immunity. The fact that it is the State which has initiated suit is irrelevant insofar as the Tribe's sovereign immunity is concerned. [Citation.] Although we may sympathize with California's need to resolve the extent of its regulatory power, the "desirability for complete settlement of all issues . . . must . . . yield to the principle of immunity." [Citation.] *Id.* at 1155.

Nor has the pervasive nature of the suit immunity been lost on the courts of this state. In *Redding Rancheria*, 86 Cal. App. 4th 384, this Court addressed the question of whether a tort action could be brought against the Tribe for injuries sustained by a female bartender working for the Tribe's casino at an off-reservation party. After the trial court denied the Tribe's motion to quash, this Court intervened and granted a writ.

In reversing the denial, this Court surveyed the relevant Supreme Court authorities, including *Kiowa Tribe* and *Oklahoma Tax Commission*. It also pointed to other California cases restricting the scope of state jurisdiction over federally-recognized tribes. *See Middletown Rancheria v. Workers' Comp. Appeals Bd.*, 60 Cal. App. 4th 1340 (1998) (Workers' Compensation Appeals Board lacks jurisdiction over Tribe); *Long v. Chemehuevi Indian Reservation*, 115 Cal. App. 3d 853 (1981) (finding the Tribe immune from lawsuit after reviewing federal law and finding no Congressional waiver of immunity).

Based on this review, this Court made the observation that is pivotal to the result the Tribe seeks here: "a state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe. [Citation.]" *Redding Rancheria*, 88 Cal. App. 4th at 387. Further, notwithstanding the scope of the state's power to regulate, this Court likewise agreed that, as a matter of controlling federal law, a Tribe is subject to suit only where Congress has authorized it or the Tribe has waived its immunity. *Id.*

Finally, in considering whether either of these two narrow exceptions applied, this Court gave no weight to the fact that the conduct alleged had not occurred on the reservation: "To say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit. [Citation.]" *Id.* at 388. Any change in that result, moreover, had to come from

Congress. *Id.* at 390; *accord Kiowa Tribe*, 523 U.S. at 660 (Court explains judicial retention of the doctrine and the superior position of Congress to "weigh and accommodate the competing policy concerns and reliance interests"); *Oklahoma Tax Commission*, 498 U.S. at 510 (While the Supreme Court continually has reiterated the tribal suit immunity doctrine, "Congress has always been at liberty to dispense with such tribal immunity or limit it").

The foregoing authorities plainly establish that the application of the Tribe's suit immunity does not invoke any sort of balancing test. Nor does it rise or fall depending on where the alleged conduct occurs or the strength of state's need or desire to regulate. Instead, absent an express and unequivocal tribal waiver or specific Congressional authorization, the Tribe's sovereignty must be respected and a state, state agency, or private party must use means *other than a lawsuit* to gain compliance with regulations or to recover for alleged commercial or personal injuries.[4]

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[4] Respondent court noted that the Supreme Court had expressed some "misgivings" about the source of tribal suit immunity and its scope. (App. 1342) Respondent court then relied on those excerpts in refusing to extend the suit immunity to the circumstances of this case. (App. 1345-46) But the Supreme Court has never seen fit to restrict the breadth of tribal suit immunity, nor to expand on the two narrowly drawn exceptions to its application. The limited exceptions established by the Supreme Court therefore remain controlling here and a lower court is not free to expand the exceptions or ignore them just because these specific factual circumstances have not been previously considered by the Supreme Court. *Sammons & Sons v. Ladd-Fab, Inc.*, 138 Cal. App. 3d 306, 310 (1982) (Supreme Court holdings are binding on state courts where matters of federal law are concerned). Most of the reported opinions regarding tribal sovereign

(continued...)

B. Because The Tribe Did Not Waive Its Immunity From Suit And Because Congress Has Not Authorized The FPPC To Sue The Tribe, Respondent Court Erred As A Matter Of Law In Refusing To Grant The Tribe's Motion To Quash

In denying the Tribe's motion to quash, respondent court acknowledged many of the controlling principles discussed above. For example, it recognized that a Tribe's suit immunity is an essential attribute of its sovereign status. (App. 1341) It also found that the suit immunity "even applies to bar a suit to enforce compliance with state regulations otherwise within the authority of the state to impose on tribal activities: 'There is a difference between the right to demand compliance with state laws and the means available to enforce them.'" (App. 1342 (citing *Kiowa Tribe*, 523 U.S. at 755)) And, finally, the court correctly identified the two limited exceptions to the suit immunity, highlighting that Tribes are subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity." (App. 1342 (citing *Kiowa Tribe*, 523 U.S. at 754))

Yet, when faced with the need to apply this straightforward standard, respondent court refused to do so. The

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immunity are from the lower federal courts. These opinions are entitled to great weight in this Court. "Lower federal court decisions on federal questions, while not binding, are persuasive and entitled to great weight in state court." *Flynt v. California Gambling Control Commission*, 104 Cal. App. 4th 1125, 1132 (2002). This is especially so where, as here, the issue is one of federal law.

court found that no waiver of immunity had occurred here. (App. 1343-45) It also noted that there was no express Congressional authorization permitting state lawsuits to enforce regulation of their political processes. (App. 1346) Since the ability to sue exists *only with* such a waiver or such express authorization, the admitted absence of both should have ended the analysis on whether the Tribe could be sued. Respondent court had no alternative except to grant the Tribe's motion to quash. (App. 1343-51)

While there was no compulsion to look further in determining whether the Tribe's motion should be granted, respondent court did so. At the FPPC's urging, it found a reservoir of authority to abrogate the immunity in the purpose of the Tenth Amendment and in the state's paramount interest in regulating its political process. Neither rationale, however, provides a basis to depart from existing law and thereby to deprive the Tribe of a fundamental attribute of its sovereignty.

C. Respondent Court's Abrogation Of Tribal Suit Immunity Based On The Purported Dictates Of The Tenth Amendment Or The State's Purported Paramount Interest In Regulating Its Political Process Is At Odds With Controlling Law

1. The Tenth Amendment Is Not A Source For The Expansion Of State Rights Against Other Federally Recognized Sovereigns

Respondent court found that if suit immunity were to extend to the judicial enforcement of state laws like the PRA, this would impermissibly conflict with the Tenth Amendment in the United States Constitution. (App. 1347) "Such federal law would intrude upon the State's exercise of its reserved power under the Tenth Amendment to regulate its electoral and legislative processes, and would interfere with the republican form of government guaranteed to the State . . . ." (App. 1347)

But the court's premise is fundamentally flawed given the basis for the Tribe's motion to quash. The Tribe's motion does not invade or invalidate the state's ability to regulate its political process. The motion implicates only the much narrower question of whether the FPPC can sue the Tribe in pursuit of its regulatory authority. On the narrower issue, the controlling case law unambiguously provides that only express federal law or a tribal waiver can create the

authorization to sue. Absent either one, there is no authority reserved to the states to permit a lawsuit.

Thus, the question is not, as respondent court suggests, whether the states have the reserved power under the Tenth Amendment to regulate their political processes or whether the federal government can, consistent with the Tenth Amendment, impede their ability to impose certain political contribution reporting and disclosure requirements. The states indisputably have the power to regulate political campaigns or create contribution disclosure rules that operate within their borders. But the mere fact that the states may have the power to enact disclosure rules for their political campaigns does not mean they can on their own, and without express Congressional approval, sue federally-recognized Tribes in furtherance of such regulatory oversight.

As noted above, and as succinctly stated by the Supreme Court in *Kiowa Tribe*, 523 U.S. at 755: "There is a difference between the right to demand compliance with state laws and the means available to enforce them." Indeed, it is the very nature of the doctrine of sovereign immunity that, in the name of an overriding principle of sovereignty, some rights will remain unredressed. That is why the contention that the power to regulate must include the power to sue has failed to persuade the courts to abrogate the Tribes' immunity from suit, much less to redefine the controlling rules under which that immunity must be applied.

Here, the power of the United States over tribal affairs is *plenary and exclusive* of the states.[5] "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). As the Supreme Court has explained, the effect of such a delegation leaves nothing in reserve for the states: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims *any* reservation of that power to the States . . . ." *New York v. United States*, 505 U.S. 144, 152, (1992)(emphasis added).

Thus, from the inception of the Constitution, regulation of tribal sovereignty has been exclusively a matter of federal law, not a power reserved to the states. Given this federal exclusivity, the Tenth Amendment has no role to play as a source to overcome tribal suit immunity: "The states unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred them to the federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985).

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[5] Both the federal courts and our state courts have long followed the principle that: "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993)(citing *Rice v. Olson*, 324 U.S. 786, 789 (1945)); *see McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168 (1973); *Middletown Rancheria*, 60 Cal. App. 4th at 1347.

As one district court further observed:

> [T]he Supreme Court has recognized Congress' plenary power "to deal with the special problems of Indians . . ." *Morton*, 417 U.S. at 551, 94 S.Ct. 2474. This power "stems from the Constitution itself." *Id.* at 552, 94 S. Ct. 2474. Indeed, the Supreme Court has held that neither the fact that an Indian tribe has been assimilated, nor the fact that there has been a lapse in federal recognition of a tribe, was sufficient to destroy the federal power to handle Indian affairs. *United States v. John*, 437 U.S. 634, 652, 98 S.Ct. 2541, 54 L.Ed. 2d 489 (1978). Accordingly, the Tenth Amendment does not reserve authority over Indian affairs to the States, and plaintiffs' Tenth Amendment claim is without merit and must be dismissed. *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 153-54 (D.D.C. 2002).

The Supreme Court of South Dakota reached the same conclusion in rejecting a claim that Congress invaded the reserved powers of the states under the Tenth Amendment regarding the custody of children by enacting the Indian Child Welfare Act, 25 U.S.C. §1901, et seq.:

> The Tenth Amendment, which reserves all nondelegated powers to the states or the people, has not been violated by the 1978 Act. The plenary power of Congress to legislate with respect to Indians is a deep-seated one. Such delegation does not infringe upon the Tenth Amendment as long as the legislative power is not exercised arbitrarily . . . . *Maner of the Guardianship of D.L.L. and C.L.L.*, 291 N.W. 2d 278, 281 (South Dakota, 1980).

The states undoubtedly do have reserved powers under the Tenth Amendment concerning their elections, just as they have

reserved powers related to taxation, civil rights, fishing, hunting, conservation, child welfare, workers compensation and the like. These are all important attributes of state sovereignty. But as the cited cases illustrate, no matter what the context in which a state's sovereign interest arises and no matter what the perceived strength of its regulatory authority, the scope of tribal suit immunity is still controlled exclusively by federal law.

That is why neither the Supreme Court, nor any other court, has looked to the Tenth Amendment in deciding whether tribal suit immunity applies. Nor could they. Given the extent of the reserved regulatory powers the states enjoy under the Tenth Amendment, a legal standard that ties tribal suit immunity to the strength of state's interest in regulating the activity involved would make suit immunity a rare exception, not a well-established rule. Such a standard cannot be reconciled with the Supreme Court cases, like *Kiowa Tribe* and *Oklahoma Tax Commission*, holding that only specific Congressional authorization or an express and unequivocal tribal wavier will suffice to overcome tribal suit immunity. Such a standard also would turn the application of the immunity on its head – state law, not federal, ultimately would control whether the Tribes enjoyed immunity from suit. Such a standard likewise cannot be adopted without disregarding both the Tribes' historic and independent sovereign status, as well as the exclusivity of federal control over the attributes of tribal sovereignty.

2. Neither California's Interest In Regulating Its Political Process, Nor The Nature Of The Tribe's Participation In That Process, Can Override Tribal Immunity From Suit

Respondent court primarily relied on the state's strong interest in ensuring the orderly management of its electoral processes to foreclose application of tribal suit immunity. (App. 1345-51) This interest was, in turn, championed by the FPPC and its amicus, who raised the specter of large campaign contributors running roughshod over elections unless the FPPC could sue. (App. 1141-44) The FPPC also contended [App. 89-91], and respondent court agreed [App. 1346], that because Tribe's political activities allegedly took place beyond the reservation's boundaries and allegedly did not involve matters of tribal governance, those facts could be relied on to elevate the state's interest at expense of tribal suit immunity. None of these rationales, however, support the denial of the motion to quash here.

a. No Weighing Of State Versus Tribal Interests Is Involved In Determining Whether The Tribal Suit Immunity Applies

Respondent court observed that issues implicating tribal sovereignty often involve a balancing of various interests. (App. 1340-51) To be sure, many of the federal and state cases dealing with tribal versus state relations reflect a balancing of relative interests. Such a weighing of interests occurs in decisions primarily

involving the reach of tribal sovereign authority or over conduct involving non-Indians engaging in activities on the reservation. In such cases, it is entirely proper to balance federal, state, and tribal interests, and to consider whether there exists a tradition of tribal regulation of the subject in question. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (federal and tribal interests in regulation of on-reservation hunting by non-Indians outweighed states interests in state licensing of such hunters, leading to a finding of federal preemption of the state licensing requirement); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("More difficult questions arise where, as here, a state asserts authority over the conduct of non-Indians engaging in activity on the reservation. . . . The inquiry . . . has called for a particularized inquiry into the status of the state, federal, and tribal interests at stake . . ."); *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1158 (1990) (tribes' sovereign power to act beyond the confines of the reservation "is a fortiori minimal").

But respondent court's reliance on the reasoning or language in cases like *Mescalero Apache Tribe* or *Boisclair* as the legal benchmark for determining tribal suit immunity [App. 1346] is misplaced. Neither case addresses the scope of tribal suit immunity, much less the circumstances in which the immunity might apply. *Mescalero Apache Tribe* resolved the unrelated question of whether New Mexico could impose a gross receipts tax on a ski resort operated by a Tribe on off-reservation land leased from the federal

government. *Boisclair* concerned whether several individual tribal officers, not the Tribe itself, enjoyed sovereign immunity from liability.

To the extent that *Boisclair* has anything relevant to say about the issue here, it is supportive of the Tribe's position, not the FPPC's. Thus, our Supreme Court acknowledged in *Boisclair* that "Indian tribes enjoy broad sovereign immunity from lawsuits" and cited *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), in support of that assertion. *Boisclair*, 51 Cal. 3d at 1157. *Santa Clara Pueblo*, in turn, upholds the Tribe's immunity from a civil rights lawsuit. More to the point, *Santa Clara Pueblo* expressly notes that in the absence of express Congressional authorization or an unequivocal waiver, lawsuits against a Tribe are barred by sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58-59. That is the precise result urged by the Tribe here.

Thus, the analysis is, and must be, different with respect to the independent and discrete question of whether a state may file a lawsuit against a tribe in furtherance of its regulatory authority. The Ninth Circuit highlighted this fundamental difference in *Dawavenda*, 226 F.3d at 1161:

> In pressing this argument, he [Dawavendewa, the plaintiff] correctly notes . . . that "the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the Tribe."
>
> From this solid precipice, however, Dawavendewa plummets to the assertion that the [Navajo] Nation cannot assert tribal

> sovereign immunity against Dawavendewa's claims. We disagree. Indeed, with this conclusion, Dawavendewa appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity. The cases Dawavendewa cites address only the extent to which a tribe may exercise jurisdiction over those who are non-members, i.e., tribal sovereign authority. These cases do not address the concept at issue here — our authority and the extent of our jurisdiction over Indian Tribes, i.e. tribal sovereign immunity.
>
> In the case at hand, the only issue before us is whether the [Navajo] Nation enjoys sovereign immunity from suit. We hold that it does, and accordingly, it cannot be joined nor can tribal officials be joined in its stead.

This distinction between the balancing test used to determine the extent or effect of tribal sovereign authority, as opposed to the legal standard applied to determine if a state may sue a Tribe in pursuit of a state's regulatory authority, is perhaps best illustrated by *Quechan Tribe*, 595 F.2d 1153. *Quechan Tribe* involved on-reservation hunting by non-Indians. For the tribal sovereign authority issue, the court applied a balancing test, which considered various tribal, state, and federal interests. *Id.* at 1155-57. However, when it came to whether a lawsuit was appropriate to enforce the state's avowed interest, no balancing of interests was even considered. On the contrary, the Ninth Circuit simply stated that "[i]t is a well-established rule that Indian tribes are immune from suit," and then held that: "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court." *Id.* at 1155.

Given this fundamental distinction between the legal standard governing the state's ability to regulate and the standard governing the authority to sue, it should come as no surprise that neither the FPPC nor respondent court cited a case where such a balancing test was applied to resolve a claim regarding tribal immunity from a lawsuit brought in state court. *There is none*.

Respondent court endeavored to distinguish *Redding Rancheria* and *Oklahoma Tax Commission* on the basis that neither case involved the kind of First Amendment or fundamental state interests "in the balance" here. (App. 1350-51) This distinction fails, however, for precisely the same reasons. Neither case invokes any kind of balancing rationale in setting forth the legal standard governing whether the suit immunity applies. Neither case invokes a supposed hierarchy of state interests in relation to that legal standard. On the contrary, each case provides that the controlling standard relating to whether there is immunity from suit implicates only two limited and discrete questions: (1) is there specific Congressional authorization for the lawsuit; or (2) has the Tribe expressly and unequivocally waived its immunity from suit?

In sum, a balancing of interests approach has no support in the decisional law where the application of tribal suit immunity is concerned. The adoption of such an approach to create an exception to the immunity is, moreover, directly at odds with controlling law.

Respondent court accordingly exceeded its jurisdictioning in relying on that approach in denying the Tribe's motion to quash.

b. Neither The Location Of The Tribe's Activities Nor Issues Of Tribal Governance Are Relevant To Determining Whether Tribal Suit Immunity Applies

The FPPC argued that the Tribe's motion to quash should be denied because the Tribe's involvement in the political process allegedly took place off its reservation and did not relate to tribal governance. (App. 89-91) Once again, however, neither one of these factors is implicated by the controlling two-part standard for determining whether an exception to the rule of suit immunity exists. Further, the Supreme Court, other federal courts, and this Court have rejected the notion that conduct occurring off-reservation has any consequence in the suit immunity analysis. (*See supra* at 15-20)

The same goes for whether the conduct involved allegedly implicates matters of tribal governance. If there were any doubt on the issue, and the Tribe submits there is not, the Supreme Court has expressly *rejected* the claim that the lawsuit immunity is confined only to cases regarding tribal self-government or economic development:

> In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-

> governance. This is evident when tribes take part in the Nation's commerce . . . .
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role that Congress may wish to exercise in this important judgment. *Kiowa Tribe*, 523 U.S. at 758.

Indeed, this Court too expressly rejected the notion that the immunity applies only if tribal self-government or economic development is impinged:

> Contrary to plaintiff's view, no "tribal goal" is required to conclude a tribal activity is immunized. Nor is it necessary to determine whether, absent the immunity, a Tribe's ability to self-govern would be infringed. [Citation.] *Redding Rancheria*, 88 Cal. App. 4th at 388.

In short, the supposed lack of any tribal goal does not provide the impetus to change, much less even to inform on, the controlling two-part legal standard.

Finally, respondent court's efforts to make the Tribe's immunity from suit the price the Tribe should pay for participation in California's electoral process also injects yet another irrelevant factor into the tribal suit immunity analysis. (App. 1346) Although the court cited *Buckley v. Valeo*, 424 U.S. 1 (1976) on this point, *Buckley* is not relevant to the present case. In *Buckley*, the Supreme Court balanced the interest in campaign contribution limitations against the

First Amendment, and struck a balance between the two. No party in *Buckley* resisted application of the federal statute on grounds of sovereign immunity. Thus, the most that *Buckley* means for the present case is that some interests concerning political campaign spending limitations are sufficient to outweigh First Amendment interests. That still does not answer the question of whether a state agency may enforce a state statute against an unconsenting Tribe by direct suit.

This participation/waiver rationale in any event is foreclosed by the United States Supreme Court decision in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). In that case, the state of North Dakota required any tribe that sought to enforce its rights as a plaintiff in civil litigation in North Dakota courts to waive its immunity from suit in such courts. In striking down the North Dakota law, the Supreme Court noted the federal constitutional interest in ensuring that all citizens have access to the courts, and held that the statutory conditions imposed by North Dakota on the exercise of that right are met only at an unacceptably high price to tribal sovereignty and thus operate to effectively bar the Tribe from the courts. *Id*. at 889-93.

Similarly, here, there is no dispute that the right to contribute to the political process is one protected by the First Amendment. Requiring the Tribe surrender its sovereign immunity in order to exercise that right is thus equally incompatible with federal

law and tribal suit immunity. If the federal statute in *Santa Clara Pueblo*, with its clear beneficial and remedial purpose, does not overcome a Tribe's sovereign immunity for the assertion of rights equivalent to those of the First Amendment, then the state statute at issue here also does not.

D. The FPPC Must Exercise Its Regulatory Initiative Through Means Other Than A Lawsuit And It Remains Free To Do So Here

The FPPC likely will express here, as it did below, a certain level of incredulity that its right to regulate the electoral process does not include the power to sue the Tribe in pursuit of its regulatory authority. Nor, it likely will urge, is it fair for the Tribe to avoid the rules that would apply to any one else who tries to influence elections with money. To hold otherwise, so the FPPC's argument goes, is to sacrifice the paramount interest of California's voters in the sanctity of the state's electoral process. (*See* App. 82-87)

But these contentions are just a rehashing of the FPPC's balancing of interests test which has no place in the immunity analysis at issue here. For example, in *Oklahoma Tax Commission*, the Supreme Court upheld a state's ability to regulate by taxing cigarette sales, but found the immunity from suit doctrine prevented the state from pursuing "the most efficient remedy," a lawsuit:

> []Under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation . . . or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores . . . . States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. . . . And if Oklahoma and the other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress. *Oklahoma Tax Commission*, 498 U.S. at 514 (citations omitted).

The FPPC has a similar range of options. It may, and does, collect the campaign contribution and lobbying engagement information it seeks to obtain from the Tribe under the PRA from the candidates, the lobbyists, and from the extensive information the Tribe already willingly provides. (App. 30) Nothing prevents the FPPC, moreover, from approaching the tribe on a government-to-government basis to negotiate an agreement that would satisfy the needs of the FPPC to both parties' approval, and the Tribe would view such a strategy with willingness and cooperation. (App. 1168-69, 1254-58) A tribal-state compact on the subject of gaming regulation already is in place, and the Tribe routinely reaches such accords with other governments at the federal, state, county and municipal levels.[6]

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[6] The prospect of the FPPC achieving its goals by government-to-government agreement, rather than attempting to subject the Tribe to direct regulation, is not illusory. The Tribe already has entered into numerous such agreements on a government-to-government basis

(continued...)

Finally, the FPPC is free to seek a legislative solution from Congress, where all the relative interests can be debated and considered.

What the state cannot do, however, is exactly what it is trying to do now: File an unauthorized, unconsented to lawsuit against the Tribe. No state, state agency, or private party has trumped tribal immunity without Congressional authorization or an express and unequivocal waiver, and the FPPC should not, as a matter of law, be the first to do so.

V

CONCLUSION

No precedent holds or suggests that the state may use a lawsuit to enforce campaign disclosure regulations against the Tribe in the absence of an express waiver of the general suit immunity rule, or an express Congressional directive that Tribes may be sued concerning campaign activity related to the state political process. This Court accordingly is requested to grant this writ, vacate the order

/ / /

/ / /

(...continued)

with many other governments at the federal, state, county, and municipal levels. Each such agreement provides benefits to the state that it could not otherwise achieve directly. (App. 1168-69, 1254-58) The record expressly shows the Tribe's willingness to discuss a similar relationship with the FPPC. (*Id.*)

below, and direct the entry of an order granting the Tribe's motion to quash.

DATED: April 7, 2003.

Respectfully submitted,

REED SMITH CROSBY HEAFEY LLP

By _____

James C. Martin
Attorneys for Petitioner and
Defendant Agua Caliente Band
of Cahuilla Indians

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH CROSBY HEAFEY LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On April 7, 2003, I served the following document(s) by the method indicated below:

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT

☒ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 7, 2003, at Los Angeles, California.

Veronica Barreto

SERVICE LIST

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